United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7445

To be argued by
DAVID B. TULCHIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-7445

FRAMEN STEEL SUPPLY COMPANY, INC.
Plaintiff-Appellant,

vs.

PHILIPS INDUSTRIES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

Issue Presented for Review

Did the District Court err in ordering that the complaint be dismissed for lack of personal jurisdiction?

I.

Counter-Statement of the Case

Framen Steel Supply Company, Inc. ("Framen") appeals from an order of the United States District Court for the Southern District of New York (Whitman Knapp, *J.*) dismissing its complaint for lack of personal jurisdiction over defendant Philips Industries, Inc. ("Philips").

After the commencement of this action, Philips moved, under Rule 12(b)(2), F.R. Civ. P., to dismiss the complaint for lack of personal jurisdiction. The trial court initially responded to the motion by ordering (on July 28, 1975) an extensive period of discovery "limited to [the] jurisdictional issues," thus granting Framen the opportunity to show (if it could) facts sufficient to establish the existence of personal jurisdiction over defendant Philips. In its Memorandum and Order of July 19, 1976 (255a-258a)* the court concluded that personal jurisdiction over Philips was lacking. Framen now seeks to win a reversal based on distortions of the factual record, irrelevancies and half-truths, all the while abstaining from challenging the legal bases for the district court's conclusion or the application of that law to the facts.

Framen, a broker of steel with annual billings in the three to five million dollar range, arranges for the importation of steel from overseas for its more than 100 regular customers (Deposition of Ruben Polne,** 174a). Inquiries from its customers are normally handled over the telephone (Deposition of Polne, 179a-180a, 183a), and in fact no one from Philips has ever met with anyone from Framen (Deposition of Polne, 237a; Affidavit of Harold H. Croghan, sworn to on May 15, 1975***, ¶ 10, 26a). After the telephone conversation, an order would follow in writing (Deposition of Polne, 183a).

Philips, an Ohio corporation with its principal place of business in Dayton, Ohio (Croghan Affidavit, ¶ 1, 25a), is not qualified to do business in New York (Croghan Affidavit

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* Numbers in parentheses which are followed by an "a" refer to pages in the Joint Appendix.

** Hereinafter referred to as "Deposition of Polne".

*** Hereinafter referred to as "Croghan Affidavit".

¶ 8, 26a), and it has no office, distribution center or manufacturing facility within the State of New York (Croghan Affidavit, ¶ 3, 25a). Philips has no personal property here, nor does it either own or rent any real property located in New York (Croghan Affidavit, ¶¶ 4, 5, 25a-26a). Although Philips maintains a transfer agent (for the transfer of shareholders' securities) here, it has no New York securities account and no New York telephone number or mailing address (Croghan Affidavit, ¶ 6, 26a). While Philips does have three employees (out of 3,000) who choose to be residents of New York, and whose area of responsibility includes territory other than New York, no officer or director of Philips resides within New York, and the corporation's shareholders' and directors' meetings are held in Dayton, Ohio (Croghan Affidavit, ¶ 7, 26a; Affidavit of Harold H. Croghan sworn to on January 30, 1976*, ¶¶ 4, 5, 77a; Affidavit of Paul Cline, ¶¶ 2, 3, 78a).

In its complaint, plaintiff alleges that Philips "wrongfully" cancelled three contracts for the purchase of steel (4a-10a). The cancelled purchase orders were prepared and executed by Philips in Nicholasville, Kentucky (Croghan Affidavit, ¶ 11, 26a) and each such purchase order provided that the "rights and duties . . . shall be determined by the laws of Ohio . . ." (Croghan Affidavit, ¶ 11, 26a).** The steel which was the subject of these purchase orders never came into contact with New York—it was shipped from Japan to Philadelphia and warehoused there (Cro-

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* Hereinafter referred to as "Croghan Supp. Affidavit".

** On the back of the purchase orders was a clause which provided that "Philips reserves the right to cancel this order, in whole or in part, at any time, without cause or default of seller . . ." (Exhibit D to Croghan Affidavit, 39a). The front side of the purchase orders said that "this purchase order is subject to all terms and conditions appearing on the face and reverse side hereof" (Exhibits A, B, and C to Croghan Affidavit, 29a-38a).

ghan Affidavit, ¶ 13, 27a; Deposition of Polne, 205a-206a, 200a, 219a, 222a).

Undaunted by the district court's holding that these facts provide no basis for personal jurisdiction over Philips, Framen insists on advancing facts which are irrelevant for jurisdictional purposes—such as "Philips' stock is traded on the New York Stock Exchange" (Appellant's Brief, at 4) and "Philips also advertises in various trade journals distributed in New York" (Appellant's Brief, at 7).

As it did in the court below, plaintiff strains to distort the extent of Philips' sales to New York. As the evidence shows and the district court held, Philips' New York sales are less than 1% of total corporate sales. This figure is derived from sales by Philips' Lau Division, which made between 3% and 5% of its domestic sales of $27 million to New York customers.* The district court adopted the figure based on the higher estimate, holding that Philips made $1,350,000 of New York sales. Comparing this number to Philips' total corporate sales of $177 million (*see* Deposition of Jim Hornberger**, 163a) results in the figure of less than 1%. Yet Framen would have this Court believe that sales by the Lau Division of "replacement and service parts in New York" (Appellant's Brief, at 5) and sales by the Lau Division's Bayley-Propellair Group*** are *in addition* to this estimate, when in fact *all* New York sales of Philips are included therein (Deposition of Donald D. Hinman, Jr.,† 94a, 95a, 99a-100a). This effort at double counting is matched by Framen's failure to explain that

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* This estimate gives a range for New York sales of between $810,000 and $1,350,000.

** Hereinafter referred to as "Deposition of Hornberger".

*** This is a *group* within the Lau Division, not a separate division of Philips, and its sales to New York were included within the 3-5% estimate (Deposition of Donald D. Hinman, Jr., 89a, 94a, 99a).

† Hereinafter referred to as "Deposition of Hinman".

Philips' sales of $5 million of humidifiers to Sears are all sales to Sears' corporate headquarters in Chicago, not to individual stores in New York or elsewhere (Deposition of Hinman, 95a-96a), and that these humidifiers are only drop-shipped to Sears' distribution centers pursuant to instruction (*see* Appellant's Brief, at 5).

Plaintiff again tries to distort the record by claiming that Philips' Mobile Home Recreational Vehicle Division makes $900,000 in sales to "New York manufacturing accounts" (Appellant's Brief, at 6). In fact, as the district court implicitly found, these sales to a Michigan corporation are sales to a *Michigan* account. The sales are invoiced, approved and paid from corporate headquarters in Michigan, with shipment of the merchandise to four manufacturing facilities located in New York (Deposition of Hornberger, 143a-145a, 150a, 162a). The Mobile Home Division's approximately 10 New York accounts purchased a negligible total, at most just a few thousand dollars a year (Deposition of Hornberger, 150a-151a), and thus the New York sales figure quoted by plaintiff for this Division actually consists of its sales to the Michigan account. Despite the fact that the district court gave plaintiff every benefit of the doubt in its findings regarding defendant's New York sales, Framen here reasserts its once-rejected attempts to exaggerate Philips' sales.

Framen's assertions regarding the "three full-time sales employees who reside in New York" (Appellant's Brief, at 4) are misleading, since the unchallenged facts (as the district court found them) are that "these salesmen are responsible for sales in the entire northeast and reside in New York at their own choice and convenience without direction from [Philips]" (256a). The salesmen do not work out of a central location, since Philips neither rents nor owns any real property, office, showroom, distribution cen-

ter or manufacturing facility within New York. Framen also says that Philips "regularly" sends personnel into New York (Appellant's Brief, at 6), when the evidence is clearly that such visits are only "occasional" (Deposition of Hinman, 120a-124a) and that they are not for the purpose of selling (Deposition of Hornberger, 146a; Deposition of Hinman, 120a).

In short, Framen seeks to have this Court redetermine the facts *de novo,* yet the district court's findings are not seriously challenged except through a series of distortions and untruths. The facts, as the district court found them (256a) and as they appear in the record, are that Philips is a foreign corporation and has no office, showroom, manufacturing plant or distribution facility in New York; that its sales to New York customers are less than 1% of total annual sales; that its three salesmen here cover a large area and choose to live in New York as a matter of their own convenience; that Philips neither owns nor rents any real property in New York and that it has no personal property here; that Philips has no phone number or mailing address in New York; and that Philips' only possible connection with New York that gave rise to any cause of action was participation by a Philips employee in Kentucky in a phone call with a Framen employee in New York.

II.

Argument

"It is basic that the burden of proving jurisdiction is upon the party who asserts it", *Lehigh Valley Industries, Inc.* v. *Birenbaum,* 527 F.2d 87, 92 (2d Cir. 1975), a burden Framen, after extensive discovery, has failed to meet. The district court's determinations, that Philips is neither "doing business" (New York CPLR § 301) nor that it trans-

acted any business in New York from which any cause of action arose (New York CPLR § 302), are correct—and Framen's arguments fail to suggest any basis for reversal. The evidence and law instead only support the trial court's findings and conclusions.

A. Philips Is Not "Doing Business" In New York

The "essential" prerequisite to the assertion of "doing business" jurisdiction under Section 301 of the CPLR* is "[c]ontinuity of action from a permanent locale". *Sterling Novelty Corp.* v. *Frank & Hirsch Distr. Co.,* 299 N.Y. 208, 210, 86 N.E.2d 564, 565 (1949). *See also Meunier* v. *Stebo, Inc.,* 38 A.D.2d 590, 591, 328 N.Y.S.2d 608, 611 (2d Dept. 1971); *Scheier* v. *Stoff,* 142 N.Y.S.2d 716 (Sup. Ct. N.Y. Co. 1955). Philips has no "local headquarters" of any kind in New York, nor any other "permanent locale" here. The three Philips employees who reside within New York are sales personnel responsible for covering large territories outside New York, who choose to live in New York for their own convenience. Philips rents no real property within New York, nor does it own any property or maintain any office, showroom, distribution center or manufacturing facility here.

Plaintiff's assertion that these facts make this case like *Manchester Modes, Inc.* v. *Lilli Ann Corp.,* 306 F. Supp. 622 (S.D.N.Y. 1969) is disingenuous, since although the defendant there "had no office in New York" (Appellant's Brief, at 8), it did have a "permanent locale"—a showroom

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* New York CPLR § 301 provides that

> "A court may exercise such jurisdiction over persons, property or status as might have been exercised heretofore."

If a foreign corporation is "doing business" in New York, personal jurisdiction under CPLR § 301 will be sustained even where (as here) the causes of action are unrelated to the acts which allegedly constitute the doing of business.

on Seventh Avenue from which two full-time employees exclusively operated. Eight to ten percent of defendant's total annual sales came about as a result of that showroom's sales efforts. The defendant also had a New York mailing address and telephone number. The existence of a permanent location out of which company activities in New York are conducted is exactly what is lacking from Philips' small New York contacts here.

Nor does *Grunder* v. *Premier Industrial Corp.*, 12 A.D.2d 998, 211 N.Y.S.2d 421 (4th Dept. 1961) support Framen's position (*see* Appellant's Brief, at 9-10). The court there merely held that where defendant had no *office* within the state, plaintiff should still be allowed to show the existence of facts which might constitute a sufficient jurisdictional predicate. The "regular maintenance of a sales force, *if of sufficient magnitude and organized, may* constitute the 'doing of business' in the state," 211 N.Y.S.2d at 422 (emphasis added), but the facts here show only that Philips has three salesmen who work out of their homes or cars, whose efforts are spread throughout the Northeast, and who are not organized from a central and permanent locale.

Framen goes even further afield in seeking comfort from *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) (Appellant's Brief, at 10). On facts very different from the minor New York contacts of the defendant here, the Supreme Court there held that under some circumstances personal jurisdiction over a foreign corporation might be exercised even where that corporation maintained no office within the state, but the decision was based on the constitutional limits of the due process clause and not CPLR § 301. New York's traditional "presence" test, *see Tauza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E.2d 915 (1917); *McShan* v. *Omega Louis Brandt et Frere, S.A.*, 536 F.2d 516, 517 (2d Cir. 1976), is far more demanding than the

constitutional limitations of the due process clause, *see Simonson* v. *International Bank,* 14 N.Y.2d 281, 285-88, 251 N.Y.S.2d 433, 435-38, 200 N.E.2d 427 (1964), and the assertion that New York could constitutionally exercise jurisdiction over Philips does not mean that CPLR § 301 has succeeded in doing so.

In *New England Laminates Co.* v. *Murphy,* 79 Misc. 2d 1025, 362 N.Y.S.2d 730 (Sup. Ct. Nassau Co. 1974), the foreign corporation had no office in New York, but its eastern sales manager resided in New York and another full-time salesman solicited orders from New York customers. The corporation made about 4% ($400,000) of its total annual sales* to New York customers, yet the combination of these factors was not enough to find the type of "continuous and systematic course of 'doing business' in New York . . . to warrant a finding of . . . 'presence' in this jurisdiction under CPLR 301." 79 Misc. 2d at 1027, 362 N.Y.S.2d at 733. *See also Irgang* v. *Pelton & Crane Co.,* 42 Misc. 2d 70, 247 N.Y.S.2d 743 (Sup. Ct. Nassau Co. 1964) (no § 301 jurisdiction even where defendant had two

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* Philips' total sales to New York customers are less than 1% of total corporate sales. *See* p. 4, *supra.* The courts, in interpreting CPLR § 301, have evaluated sales to New York customers in relation to total sales of the corporate defendant. *See, e.g., Chunky Corp.* v. *Blumenthal Bros. Chocolate Co.,* 299 F. Supp. 110, 113 (S.D.N.Y. 1969); *New England Laminates, supra.* Although Framen argues that this is not the "appropriate test" (Appellant's Brief, at 12), it supports its argument only with a reference to *Fashion Two Twenty, Inc.* v. *Steinberg,* 339 F. Supp. 836, 841 (E.D.N.Y. 1971), which did not pass on CPLR § 301. *Fashion Two Twenty* arose under a federal statute, 15 U.S.C. § 22, providing for nationwide service of process in antitrust actions, and the language quoted by plaintiff regarding the amount of sales necessary to sustain jurisdiction referred only to the "transacting business" test of CPLR § 302. Since even Framen does not argue that its cause of action arose from any of Philips' sales in New York (as required by § 302), the *Fashion Two Twenty* language is simply irrelevant.

resident New York salesmen, two New York phone numbers, and its name appeared in the lobby of two New York buildings). Philips has even less contact with New York than that of the corporate defendants in the *New England Laminates* and *Irgang* cases—its salesmen travel throughout the Northeast, and less than 1% of its annual sales are to New York customers. No number of irrelevancies—such as the allegation that Philips is a "giant" corporation or the fact that it occasionally sends employees into the state on goodwill visits*—can change the nature of Philips' contacts with New York from minimal to the "substantial and continuous" contact required by CPLR § 301.

All of Philips' small amount of sales to New York customers are invoiced in Dayton, Ohio and are FOB point of manufacture (Deposition of Hinman, 128a). Philips has no manufacturing facilities in New York (Deposition of Hornberger, 160a-161a). The contracts for sale of goods by Philips were all Ohio contracts with performance to take place outside New York, and with title to pass at the point of manufacture. A foreign corporation does not conduct business within New York merely by the shipment of a relatively insubstantial portion of its sales to local customers within the state. *See Delagi* v. *Volkswagenwerk AG*, 29 N.Y.2d 426, 433, 328 N.Y.S.2d 653, 657, 278 N.E.2d

* Occasional sales support visits cannot provide a basis for § 301 jurisdiction. In *Meunier* v. *Stebo, Inc., supra*, for example, the foreign corporation sent officers and employees to New York to promote business, sent promotional literature into the state, and maintained a direct telephone line to New York, yet these contacts were found insufficient to satisfy § 301. *See also Liquid Carriers Corp.* v. *American Marine Corp.*, 375 F.2d 951, 953 (2d Cir. 1967) (occasional visits to New York by the defendant's vice president "to solicit business and to negotiate contracts for American Marine were not sufficiently regular or extensive . . . to hold that American Marine is 'doing business' in the state"); *Knapp* v. *Robertson Manufacturing Co.*, 155 N.Y.S.2d 490, 493 (Sup. Ct. Monroe Co. 1956).

895, 898 (1972) ("mere sales of a manufacturer's product in New York, however substantial, have never made the foreign corporation manufacturer amenable to suit in this jurisdiction"); *Kramer* v. *Vogl*, 17 N.Y.2d 27, 267 N.Y.S.2d 900, 215 N.E.2d 159 (1966); *McNellis* v. *American Box Bd. Co.*, 53 Misc. 2d 479, 482, 278 N.Y.S. 2d 771, 775 (Sup. Ct. Onondaga Co. 1967) ("the shipment of goods from without the State to designated buyers on contracts made outside the State is not sufficient to constitute 'doing business'"); *Irgang* v. *Pelton & Crane Co., supra*, 42 Misc. 2d at 72, 247 N.Y.S.2d at 746.*

Philips' few manufacturers representatives in New York purchase small amounts of Philips products for resale to wholesalers (Deposition of Hinman, 99a-101a). Sales to these manufacturers representatives *do not* "constitute a substantial part of Philips' operations" (*See* Appellant's Brief, at 11).** Plaintiff ignores the fact that the manu-

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* Likewise, when *purchases* of products from New York firms are only "sporadic" and "intermittent", jurisdiction will not be sustained on that ground. *See Sterling Novelty Corp.* v. *Frank & Hirsch Distributing Co., supra*, 299 N.Y. at 212, 86 N.E.2d at 566. *See also Pollak* v. *Western Dept. Stores, Inc.*, 136 N.Y.S. 2d 393 (Sup. Ct. N.Y. Co. 1954); *Emerson Radio & Phonograph Corp.* v. *Mayflower Sales Co.*, 124 N.Y.S.2d 83, 84 (Sup. Ct. N.Y. Co. 1953) ("the concept of 'doing business' according to the overwhelming weight of authority requires more than the isolated operation of buying a portion of its wares in this jurisdiction.") Philips here had no exclusive buying agent in New York, no local headquarters and ordered merchandise (which was manufactured in Japan and warehoused in Pennsylvania) from Framen on an irregular and sporadic basis.

** Sales to manufacturers representatives located in New York amount only to about $220,000 per year by the Lau Division (Deposition of Hinman, 101a-102a). These sales were explicitly included within the estimate of total sales ($810,000-$1,350,000). As Mr. Hinman testified, the estimate of sales to New York "is everything. That includes whatever is sold through manufacturers' representatives. . . ." (Deposition of Hinman, 94a. *See also* 95a, 99a-100a). The Mobile Home Recreational Vehicle Division's sales of replacement parts to New York dealers is "of little consequence" (Deposition of Hornberger, 148a).

facturers representatives here are not exclusive representatives for Philips—they are "independent businessmen acting . . . for us and for other people" (Deposition of Hinman, 101a).* There is no evidence that they stock Philips parts "for the proper maintenance of the equipment which [Philips] sells in New York", nor is there any evidence in the record for (or any truth behind) the allegation that without these manufacturers representatives "Philips would have to establish its own facilities in New York" (Appellant's Brief, at 11).**

These facts make *Gelfand* v. *Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), *cert. den.* 390 U.S. 996 (1968), inapplicable since there is no counterpart here to the truly vital services—handling over 40% of defendant's annual bookings—that were performed for defendant in New York in the *Gelfand* case.

The extent to which Framen grasps at jurisdictional straws is revealed by its claim that Philips' securities are traded on a stock exchange located in New York and that Philips retains a transfer agent in New York. Arguments based on such facts have been squarely rejected as grounds

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* Framen's assertion that the manufacturers representatives perform "vital warehousing functions" for Philips (Appellant's Brief, at 18) is (like other allegations) unsupported and completely contrary to fact. The representatives are "independent businessmen" selling for their own account. As the Second Circuit recognized in *McShan* v. *Omega Louis Brandt et Frere, S.A.*, *supra*, 536 F.2d at 517-518, "sales, no matter how substantial, of a foreign manufacturer's product in New York through an independent agency do not make the foreigner amenable to suit in New York, even though the products are advertised in the local media."

** The evidence, instead, is that the manufacturers representatives "sell to wholesalers" (Deposition of Hinman, 101a) and that Philips could "deal directly with [those] wholesalers" (Deposition of Hinman, 101a).

for "doing business" jurisdiction. *See Grossman* v. *Sapphire Petroleums Ltd.*, 195 N.Y.S.2d 851 (Sup. Ct. Kings Co. 1959); *Robbins* v. *Ring*, 9 Misc. 2d 44, 166 N.Y.S.2d 483 (Sup. Ct. N.Y. Co. 1957). *See also Wahl* v. *Vicana Sugar Co.*, 144 N.Y.S.2d 613 (Sup. Ct. N.Y. Co. 1955), *aff'd* 2 A.D. 2d 848, 156 N.Y.S.2d 993 (1st Dept. 1956).*

Philips' lack of any meaningful and substantial contact with New York—the lack of an office, distribution center or manufacturing plant in New York and insubstantial sales to and purchases from New York firms—all as found by the district court and amply supported by the evidence, compels the conclusion that Philips is not "doing business" in New York. Framen is apparently adept at listing irrelevant factors, perhaps in an effort to make much from a string of nothings. Yet Framen cannot show "continuity of action from a permanent locale" and thus, as the court below found, "the totality of [Philips'] New York contacts does not rise to the level ordinarily considered by New York courts sufficient to create jurisdiction" (257a).

B. Philips Did Not Transact Business In New York From Which Any Cause of Action Arose

N.Y. CPLR § 302(a)(1) provides, in relevant part:

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise

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* Equally meaningless is Framen's repeated assertion that Philips "advertises in various trade journals distributed in New York" (Appellant's Brief, at 7, *see also* 10, 18), since such advertisements (especially in journals published outside New York) cannot support "doing business" jurisdiction. *See Carbone* v. *Fort Erie Jockey Club, Ltd.*, 47 A.D.2d 337, 339, 366 N.Y.S.2d 485, 487 (4th Dept. 1975); *Baird* v. *Day & Zimmerman, Inc.*, 390 F. Supp. 883, 884 (S.D.N.Y. 1974); *Delagi* v. *Volkswagenwerk AG, supra*, 29 N.Y.2d at 432, 328 N.Y.S.2d at 657, 278 N.E.2d at 897-98.

> personal jurisdiction over any non-domiciliary . . . who in person or through an agent:
>
> 1. transacts any business within the state. . . ."

The express terms of the statute require that a cause of action arise from a non-domiciliary's "transaction" of business within New York. Framen's complaint alleges three causes of action, each for breach of contract, arising out of the alleged cancellation of purchase orders in late 1974 (4a-10a). Thus, to sustain jurisdiction, Framen must show that one or more of the alleged breaches of contract *arose from* some transaction of business by Philips in New York.

Although Framen argues that the evidence shows "much more" than the making of a telephone call by Philips to New York (Appellant's Brief, at 14), it cannot show anything more, because Philips had no further New York contact from which any cause of action arose. The "prior course of dealing" between the parties is simply irrelevant, since none of the "prior dealings" gave rise to any cause of action, as explicitly required by CPLR § 302. Even more remarkable is Framen's insistence that the "custom of the steel market" demonstrates that the placing of the phone call itself constituted an order, since even if that were true,* it wouldn't make the slightest difference. As Framen concedes (Appellant's Brief, at 14), the district court *correctly* held that "making a telephone call to New York to place an order" (256a) is not sufficient to establish § 302 jurisdiction. "[T]here is no transaction of business in New York where an offer placed outside the State by telephone is received and accepted in New York." *Glassman* v. *Hyder*, 23 N.Y.2d 354, 363, 296 N.Y.S.2d 783, 789, 244 N.E.2d 259, 263 (1968).

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* Our view is that the written purchase order (*see* Exhibits A-D to Croghan Affidavit, 29a-39a) was the order (and not merely a "confirmation"), but the court here need not decide the issue.

The facts establish *nothing more* than the one phone call by Philips.* There were never any meetings in New York between Philips and Framen (Deposition of Polne, 237a) and the steel was manufactured in Japan and shipped from there to Philadelphia.** The contracts for the sale of this steel were not governed by New York law. Each purchase order expressly provided that:

> "APPLICABLE LAW
>
> Rights and Duties of the Philips and Seller parties hereto shall be determined by the laws of Ohio and to that end this agreement shall be construed and considered as a contract made and to be performed in Ohio." (39a)

See also Croghan Affidavit, ¶ 11, 26a. That is, the parties agreed that these transactions would be considered to have been made at Philips' principal place of business in Ohio, to be governed by Ohio law and to be performed in Ohio.

Framen's reliance on *Parke-Bernet Galleries, Inc.* v. *Franklyn, supra,* is ironic, since the court held that the activity of defendant there "far exceeded the simple placing of an order by telephone", 26 N.Y.2d at 18, 208 N.Y.S.2d at 340, 256 N.E.2d at 508, in that defendant directly controlled

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* Framen's own actions in New York cannot provide a basis for jurisdiction, even under an argument (advanced by Framen below but abandoned here) that Framen was Philips' agent. *See Parke-Bernet Galleries, Inc.* v. *Franklyn,* 26 N.Y.2d 13, 19 n.2, 308 N.Y.S.2d 337, 341 n.2, 256 N.E.2d 506, 509 n.2 (1970); *Haar* v. *Armendaris Corp.,* 31 N.Y.2d 1040, 342 N.Y.S.2d 70, 294 N.E.2d 855 (1973), *rev'g* 40 A.D.2d 769, 337 N.Y.S.2d 285 (1st Dept. 1972).

** These facts are almost identical to those in *Rainbow Indus. Products* v. *Haybuster Mfg., Inc.,* 419 F. Supp. 543 (E.D.N.Y. 1976), where the court found no § 302 jurisdiction. *See also Galgay* v. *Bulletin Co., Inc.,* 504 F.2d 1062, 1066 (2d Cir. 1974) where the shipment of goods FOB New York by a New York plaintiff was insufficient to confer § 302(a)(1) jurisdiction. Certainly a shipment unrelated to New York (as here) cannot do more.

the every action of his agent (a Parke-Bernet employee "loaned" to defendant for the duration of an auction) who was physically present in New York and who was taking part in the auction at defendant's direction. Here, in contrast, the undisputed evidence is that, at most, the only contact with New York was "the simple placing of an order by telephone," and Philips had no control over (or even knowledge of) the actions of plaintiff or plaintiff's suppliers (*see* Deposition of Polne, 190a, 194a-196a, 221a).

Unlike *Margaret Watherston, Inc.* v. *Forman,* 73 Misc. 2d 875, 342 N.Y.S. 2d 744 (1st Dept. 1973), where a nonresident shipped a chattel to New York knowing that work was to be performed on the chattel here, no "services" were rendered in New York (the goods were manufactured in Japan) and the steel never touched New York (it was shipped to Philadelphia and stored there). Philips itself made no contact with New York in connection with any of the transactions which are the subject of the complaint except to participate (from out of state) in a phone conversation and to mail purchase orders to plaintiff's World Trade Center offices.

Despite its protestations to the contrary, Framen is left with the untenable position of arguing jurisdiction based on a telephone call. *See Parke-Bernet Galleries, Inc.* v. *Franklyn, supra,* 26 N.Y.2d at 17, 208 N.Y.S.2d at 340, 256 N.E.2d at 508; *Friedr. Zoellner (New York) Corp.* v. *Tex Metals Co.,* 396 F.2d 300 (2d Cir. 1968); *Glassman* v. *Hyder, supra; Perlman* v. *Martin,* 70 Misc. 2d 169, 171, 332 N.Y.S. 2d 360, 363 (Sup. Ct. Nassau Co. 1972). Irrelevant for purposes of "transacting business" jurisdiction are the vague allegations of a "prior course of dealing" or the "custom of the steel market". Framen would substitute acts from which no cause of action arose for the statute's requirement —a showing of "purposeful activity" * in New York which gave rise to the causes asserted in the complaint.

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* *Ringers' Dutchocs, Inc.* v. *S.S.S.L. 180,* 494 F.2d 678, 681 (2d Cir. 1974). *See also Galgay* v. *Bulletin Co., Inc., supra,* 504 F.2d at 1064.

III.

Conclusion

Framen failed below to meet its burden of establishing the existence of personal jurisdiction over Philips, and has advanced no reasons for this Court to reverse the district court's judgment dismissing the complaint. The district court's factual findings gave every benefit of doubt to plaintiff, and it unerringly applied New York law to those facts. The order of the district court should therefore be affirmed.

Respectfully submitted,

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January 14, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

FRAMEN STEEL SUPPLY COMPANY, INC., :

Plaintiff-Appellant, :

-against- : No. 76-7445

PHILIPS INDUSTRIES, INC., :

Defendant-Appellee. :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DOROTHY M. SCHLIP, being duly sworn, deposes and says that she is over the age of twenty-one years; that she is employed by the firm of Sullivan & Cromwell, attorneys for Defendant-Appellee; that on the 14th day of January, 1977 she served the within Brief upon Bass, Ullman & Lustigman, attorneys for plaintiff-appellant by depositing two (2) true copies of the same securely enclosed in a postpaid wrapper in the Post Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said attorneys at 747 Third Avenue, New York, N.Y. 10017, that being the address within the state designated by them for that purpose upon the preceding papers in this action.

Dorothy M. Schlip

Sworn to before me this
14th day of January, 1977

George A. Scholze
Notary Public

GEORGE A. SCHOLZE
Notary Public, State of New York
Residing in Nassau County
Nassau Co. Clk's No. 30-3526250
Certificate Filed In
New York Co. Clk's Office
Commission Expires March 30, 1977